Supreme Court, U.S.
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No. 94-1062

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN D. MCCULLOUGH,
Petitioner,

v.

BRANCH BANKING & TRUST COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Fourth Circuit correctly apply the 180-day statute of limitations contained in North Carolina's Handicapped Persons Protection Act, N.C. Gen. Stat. § 168A-1, *et seq.*, to a claim brought under § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1985)?

LIST OF ALL PARTIES

The list of all parties to this proceeding appear in the caption.

CORPORATE DISCLOSURE STATEMENT

Respondent Branch Banking & Trust Company, Inc. hereby certifies that the following is a full and complete list of all parent companies and subsidiaries (except wholly owned subsidiaries):

Branch Banking & Trust Financial Corporation, parent

Branch Banking & Trust Company, Inc., subsidiary

Nexus, Incorporated, subsidiary

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ALL REPORTS OF OPINIONS

The Magistrate Judge's Memorandum & Recommendation recommending dismissal due to untimeliness is unreported, as is the district court's opinion refusing to adopt that portion of the Magistrate Judge's Memorandum & Recommendation. The Magistrate Judge's Memorandum & Recommendation recommending that summary judgment be granted in favor of BB&T is unreported. The district court's decision granting summary judgment is reported at 844 F. Supp. 258 (E.D.N.C. 1993). The Fourth Circuit's opinion affirming the grant of summary judgment on other grounds is reported at 35 F.3d 127 (4th Cir. 1994).

TEXT OF RELEVANT STATUTES

Relevant provisions of North Carolina's Handicapped Persons Protection Act, N.C. Gen. Stat. §§ 168A-1, *et seq.*, are as follows:

"The purpose of this Chapter is to encourage and enable all handicapped people to participate fully to the maximum extent of their abilities in the social and economic life of the State, to engage in remunerative employment, to use available public accommodations and public services, and to otherwise pursue their rights and privileges as inhabitants of this state." N.C. Gen. Stat. § 168A-2(a).

"No court shall have jurisdiction over an action filed under this Chapter where the plaintiff has commenced federal judicial or administrative proceedings under section 503 or section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 793 and 794, as amended, or federal regulations promulgated thereunder, involving or arising out of the facts and circumstances involved in the alleged discriminatory practice under this Chapter. If such proceedings are commenced after a civil action has been commenced under this Chapter, the State court's jurisdiction over the civil action shall end and the action shall be forthwith dismissed." N.C. Gen. Stat. § 168A-11(c).

"A civil action brought pursuant to this Chapter shall be commenced within 180 days after the date on which the aggrieved person became aware or, with reasonable diligence, should have become aware of the alleged discriminatory practice or prohibited conduct." N.C. Gen. Stat. § 168A-12.

Relevant portions of the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.*, are as follows:

"The powers, remedies, and procedures set forth in sections 705, 706, 707, 709 and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall

be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116, concerning employment." 42 U.S.C. § 12117(a).

Relevant portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, are as follows:

"A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful practice has occurred. . . ." 42 U.S.C. § 2000e-5(e)(1) (§ 706 of Title VII).

N.C. Gen. Stat. § 1-52 provides as follows:

Within three years an action —

. . .

(5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.

STATEMENT OF THE CASE

Petitioner Stephen D. McCullough's (hereafter "McCullough") first full-time employer following his graduation from college in 1978 was First Union National Bank. In 1983, McCullough was involved in an automobile accident in which a pedestrian was injured. McCullough was convicted of felonious hit and run with personal injury and driving under the influence, and was subsequently discharged by First Union.

In 1986 McCullough applied for employment with Respondent Branch Banking & Trust Company, Inc. (hereafter "BB&T"). In his interviews, McCullough explained the circumstances of the 1983 accident which led to his termination from First Union, but did not mention any of his previous arrests. Despite McCullough's history, BB&T hired him effective June 30, 1986, as a Liability Management Specialist. McCullough's immediate

superior while he was employed by BB&T was Rodney Hughes; Hughes reported to Scott Reed, Senior Executive Vice President, Chief Financial Officer.

At the time that McCullough was hired by BB&T, he was using marijuana regularly and was also drinking alcohol approximately five nights per week. McCullough continued to use marijuana regularly, until October 1990, and also continued to use alcohol regularly, through at least March 1, 1991, the day he was informed he was being suspended from employment.

Due to his continued use of alcohol, McCullough occasionally arrived at work with a hangover or arrived at work late. McCullough was counselled both verbally and in writing during 1987 and 1988 for these problems.

McCullough's alcohol-related arrests also continued after he was hired by BB&T. In 1986 and 1987, McCullough was charged twice with public intoxication in Horry County, South Carolina. On August 11, 1987, McCullough was arrested in Wake County, North Carolina, and was charged with Driving While Impaired ("DWI"); he was found not guilty. McCullough did not inform BB&T of this arrest.

One month later, on September 20, 1987, McCullough was arrested by Durham County authorities and charged with DWI. Before the Durham County charge was resolved, McCullough was arrested again, this time in Wilson County on December 4, 1987, and was charged with DWI and Driving With License Revoked ("DWLR"). McCullough was convicted of DWI in both the Durham and Wilson County arrests. As a result, McCullough was sentenced to serve, and did in fact serve, seven days in jail. McCullough did not tell BB&T about these arrests or about the time he spent in jail.

BB&T learned of the Wilson County arrest when a BB&T employee read about it in The Wilson Daily Times. As a result, Hughes met with McCullough and told him that "counselling

was available and while [McCullough's] participation in that counselling was not required, 'further incidences of alcohol/ drug abuse would not be tolerated at BB&T and would result in [McCullough's] termination.'" Hughes also asked McCullough to meet with BB&T's then-Human Resources Development Manager, Whit Strunk, about the possibility of counselling for alcohol problems. Although McCullough met with Strunk, he did not follow Strunk's suggestion that he obtain an assessment at Charter North Ridge alcohol treatment center.

On October 20, 1990, McCullough was again arrested and charged with DWI and Driving With License Permanently Revoked ("DWLPR"). In connection with these charges, McCullough appeared for a hearing at the Department of Motor Vehicles ("DMV") in February 1991. While standing in the hall outside the hearing room, McCullough's then-counsel made the statement that McCullough had been living in Florida for the past three years. McCullough testified that the attorney intended this statement to be overheard by the traffic policeman, Horace Macon, because he felt it might be helpful to shed some doubt on McCullough's residence. Later, at the hearing, McCullough told the DMV hearing officer that he lived at a Florida address, even though he had been living in North Carolina at all times since 1986.

As a direct result of these events, Horace Macon contacted Billy Montague, then-Human Resources Director for BB&T, on February 12, 1991, in an attempt to verify McCullough's employment and residence in North Carolina. Macon reported the events of the hearing. In response, BB&T undertook an investigation into McCullough's criminal record. This investigation showed various arrests of which BB&T had previously been unaware, and showed that McCullough's North Carolina driver's license had been revoked.

Following this investigation, on March 1, 1991, McCullough was placed on a leave of absence without pay. McCullough's

employment with BB&T was terminated effective March 13, 1991, for loss of confidence resulting from McCullough's lies to his superiors and failure to provide relevant information concerning his employment.

McCullough filed his Complaint alleging a violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794, on May 28, 1992, *442 days after the date that he alleged he was wrongfully discharged.*

BB&T filed a Motion to Dismiss, which sought, among other things, dismissal of McCullough's § 504 claim on the ground that it was barred by the 180-day statute of limitations set forth in the North Carolina Handicapped Persons Protection Act, N.C. Gen. Stat. §§ 168A-1, *et seq.* (hereafter the "N.C. Act").

The Magistrate Judge recommended, *inter alia*, that McCullough's § 504 claim be dismissed as untimely. The district court, however, disagreed, holding instead that the most appropriate North Carolina statute of limitations for a § 504 claim was the three-year statute of limitations for personal injury claims set forth in N.C. Gen. Stat. § 1-52(5).

Following the conclusion of discovery, BB&T moved for summary judgment on all remaining counts. With respect to McCullough's § 504 claim, BB&T argued, among other things, that it was not a recipient of federal financial assistance and therefore not subject to § 504. The Magistrate Judge recommended that summary judgment in favor of BB&T be granted on all counts, finding with respect to the § 504 claim that the receipt of SBA guaranteed loan funds does not constitute receipt of federal financial assistance. The district court adopted the Memorandum and Recommendation with respect to the Magistrate Judge's determination that BB&T was not a recipient of federal financial assistance; on this basis, the district court granted summary judgment in favor of BB&T on McCullough's § 504 claim. The district court dismissed McCullough's two state law claims without prejudice.

On appeal, the Fourth Circuit did not address the district court's determination that BB&T was not a recipient of federal funds, but affirmed the dismissal on the alternate ground that the claim was barred by the 180-day statute of limitations contained in the N.C. Act.

BASIS FOR JURISDICTION BELOW

Jurisdiction was proper in the Fourth Circuit pursuant to 28 U.S.C. § 1291, as the case was on appeal from a final decision of the United States District Court, Eastern District of North Carolina. Jurisdiction was proper in the district court with respect to McCullough's claim under § 504 of the Rehabilitation Act pursuant to 28 U.S.C. § 1331, as this claim involved the interpretation of laws of the United States.

ARGUMENT

I. McCullough's Petition for Certiorari Should Be Denied.

Rule 10 of the Rules of the Supreme Court of the United States sets forth the circumstances under which certiorari will be granted. The only provisions which apply to review of decisions by circuit courts of appeal are as follows:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision.
>
> . . . .
>
> (c) When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Because none of the above circumstances exist in the present case, and because no other reasons have been advanced to justify review by this Court, McCullough's Petition for Certiorari should be denied.

A. The Timeliness Issue Presented Herein Is Not An Important Question Which Should Be Settled By This Court, Nor Does The Fourth Circuit's Decision Conflict With Applicable Decisions Of This Court.

The Rehabilitation Act of 1973 does not provide a statute of limitations for claims brought pursuant to § 504. This Court, however, has already considered the appropriate steps to take in

cases where federal statutes without limitations periods are at issue. In such cases, federal courts must "adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). This Court has also set forth a framework to determine *which* state statute of limitations to use; specifically, this Court has concluded "that Congress intended that the courts apply the *most closely analogous statute of limitations under state law.*" *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983) (emphasis supplied). As noted by the Fourth Circuit below, this process involves a two-pronged analysis:

> [T]he court should first select the state statute "most analogous" to the federal claim. The court should then consider whether application of that limitations period is consistent with the federal statute and its underlying policies.

McCullough, 35 F.3d at 129.

Here, the Fourth Circuit determined that the N.C. Act was the state statute most analogous to the federal Rehabilitation Act, and therefore applied the 180-day statute of limitations contained therein to McCullough's § 504 claim. This decision does not constitute an "important question of federal law which has not been, but should be, settled by this Court." As noted above, the framework for selecting limitations periods for claims under federal statutes lacking timeliness rules has already been set forth by this Court. While McCullough apparently disagrees with the specific state statute of limitations selected by the Fourth Circuit, this does not, in and of itself, compel the grant of certiorari. In fact, should this Court review all cases in which a party disagrees with the state statute of limitations applied by a federal court to a particular federal statute, its docket would likely consist of nothing else. The fact remains that the Fourth Circuit meticulously applied the guidelines set forth by this

Court to select the state statute of limitations most analogous to McCullough's § 504 claim.

Nor is review appropriate on the grounds that the Fourth Circuit's decision somehow "conflicts with applicable decisions of this Court." Again, the standards and lessons of *Wilson* were carefully analyzed and applied by the Fourth Circuit below. As is discussed in detail in the sections immediately following, the Fourth Circuit clearly followed *Wilson* when it correctly determined that the N.C. Act's statute of limitations should be applied to McCullough's claims.

1. The 180-Day Limitation In N.C. Gen. Stat. § 168A-12 Is The Most Analogous State Statute Of Limitations

Under *Wilson*, the first inquiry is which North Carolina statute is most analogous to the Rehabilitation Act. *McCullough*, 35 F.3d at 129. Here, the N.C. Act, which contains a 180-day statute of limitations, is clearly the most analogous state statute. Like the Rehabilitation Act, the N.C. Act specifically addresses employment discrimination on the basis of handicap or disability. N.C. Gen. Stat. § 168A-5. The N.C. Act also proscribes handicap discrimination in other areas, such as public accommodations, services and transportation. N.C. Gen. Stat. §§ 168A-6 - 8. Moreover, the N.C. Act prohibits discrimination by both private and public employers, as well as by labor organizations and individuals or entities who control training programs. N.C. Gen. Stat. § 168A-5(a). Thus, the N.C. Act clearly provides a *comprehensive prohibition against discrimination on the basis of handicap*. Furthermore, both the N.C. Act and the Rehabilitation Act permit the direct filing of a civil lawsuit. N.C. Gen. Stat. § 168A-11(a). Thus, the N.C. Act provides parallel redress to the very same class of aggrieved persons in the same manner as does the Rehabilitation Act.

In a recent Virginia case brought pursuant to § 504 of the Rehabilitation Act, the Fourth Circuit applied the statute of limitations found in a Virginia state statute prohibiting handicap discrimination. In *Wolsky v. Medical College of Hampton Rds.*, 1 F.3d 222 (4th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 881 (1994), the Fourth Circuit applied the one-year statute of limitations set forth in the Virginia Rights of Persons with Disabilities Act, Va. Code Ann. §§ 51.5-40, *et seq.*, to a § 504 case. The court held that, because the Virginia Act specifically redressed discrimination on the basis of handicap and was patterned after the Rehabilitation Act, the Virginia Act was "the most analogous statute, and its statute of limitations is applicable." *Wolsky*, 1 F.3d at 225. *See also Eastman v. Virginia Polytechnic Inst. and State Univ.*, 732 F. Supp. 665 (W.D. Va. 1990), *aff'd on other grounds*, 939 F.2d 204 (4th Cir. 1991) (district court found that the one-year statute of limitations contained in the Virginia Act was the "most analogous" state statute of limitations); *Carrozza v. Howard County*, 847 F. Supp. 365 (D. Md. 1994) (holding that the proper limitations period for the plaintiff's Rehabilitation Act claim is the six-month period provided in Md. Ann. Code art. 49B, § 9A, which applies to, *inter alia*, claims for disability discrimination in employment).

On the other hand, the North Carolina general three-year statute of limitations for personal injuries (N.C. Gen. Stat. § 1-52(5)), advanced by McCullough as the most analogous state statute of limitations, is not appropriate. As the Fourth Circuit noted in its opinion below, the general wrongful discharge statute to which the personal injury statute of limitations has been applied "protects against a wide range of discrimination which, although including persons with disabilities, also encompasses many other classes of individuals." *McCullough*, 35 F.3d at 132.

The fact that the N.C. Act and the Rehabilitation Act are not identical does not require the use of yet another statute of

limitations. The reasoning which compels the conclusion that the N.C. Act's 180-day statute of limitations is the most analogous state statute can best be set forth by quoting the Fourth Circuit's astute analysis:

> The differences between the North Carolina Act and the Rehabilitation Act identified by McCullough do not, by themselves, magically tip the balance of similarities so as to make the general wrongful discharge provision more analogous to the Rehabilitation Act than the specific provisions of the North Carolina Act. It simply means that, in North Carolina, there is no perfect counterpart to the Rehabilitation Act, and we must determine which statute is more appropriate. To make this determination, we must look at both statutes in their entirety to ascertain which North Carolina law is most similar to the cause of action provided under the Rehabilitation Act. For example, in *Wilson*, 471 U.S. at 272-75, the Court considered the underlying causes of action created by 42 U.S.C. § 1983 (1988) and determined that, because such a broad variety of claims could be asserted under § 1983, it was more analogous to a general cause of action. Since all § 1983 actions involve alleged injuries to the personal civil rights of the claimants, the Court concluded that the cause of action can best be characterized as one for personal injury. *Id.* at 277-78. In *Wolsky*, 1 F.3d at 223, we reasoned that the Rehabilitation Act was not a general provision such as § 1983, but a more specifically tailored statute intended to redress discrimination against a refined class of individuals. We therefore concluded that the underlying cause of action of the Rehabilitation Act was more similar to the specific provisions of the Virginia Act, which also redressed discrimination against disabled individuals, than it was to the general personal injury provisions under Virginia law. . . . [Here,] because the Rehabilitation Act is a specific statute directed at protecting one class of persons, the specific North Carolina

> Act is more analogous to McCullough's claim than a general wrongful discharge statute.

McCullough, 35 F.3d at 132.

In sum, both the N.C. Act and § 504 have as their primary and specific purpose the elimination of arbitrary discrimination against a specific class of persons: otherwise qualified disabled individuals. Both statutes provide for parallel equitable remedies should the claimant succeed in proving intentional discrimination. Neither statute contains an administrative, charge-filing requirement, but both permit direct filing of a civil lawsuit. Clearly, the N.C. Act's 180-day statute of limitations is the most appropriate state statute of limitations.

2. Application Of A 180-Day Statute Of Limitations Does Not Violate Federal Law Or Policy.

Under the second prong of the analysis set forth in *Wilson*, it is necessary to determine whether application of the 180-day statute of limitations is consistent with the federal Rehabilitation Act and its underlying policies. *McCullough*, 35 F.3d at 131. Contrary to McCullough's claims, such application does not conflict with federal law or policy. To begin with, it is absurd to suggest that application of a 180-day statute of limitations to a handicap discrimination claim is somehow in and of itself inconsistent with federal policy. *Congress itself has approved such a limitations period* by enacting the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (the "ADA"). The ADA requires that claimants file a charge of discrimination with the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory action. *See* 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(e)(1). (McCullough's Petition erroneously claims that the ADA is "silent in regard to a limitations period." *Petition* at 34.) This Court has held that the charge filing requirement is akin to a statute of limitations. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Signifi-

cantly, the ADA and the Rehabilitation Act are similar in purpose and scope, as both are designed to assist otherwise qualified disabled persons with employment opportunities. Clearly, the application of a 180-day statute of limitations to the Rehabilitation Act would not violate federal policy and interests where Congress has expressly established such a limitation in a strikingly similar statute.

Nor is the ADA the only 180-day statute of limitations approved by Congress. The Civil Rights Act of 1964, which, like the Rehabilitation Act, was enacted to assure employment opportunities to certain qualified individuals, contains a 180-day charge filing requirement. 42 U.S.C. § 2000e-5(e)(1). Similarly, in *DelCostello*, 462 U.S. 151, 172, this Court held that the six-month statute of limitations set forth in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), should be applied to an employee's suit against an employer and a union, alleging the employer's breach of a collective-bargaining agreement and the union's breach of its duty of fair representation.[1]

McCullough's primary argument concerning this step of the analysis, however, is that the 180-day statute of limitations contained in the N.C. Act is inappropriate because the N.C. Act somehow violates the federal constitution by "forc[ing] an aggrieved person to choose between the pursuit of his/her rights under either" the N.C. Act or the Rehabilitation Act. McCullough does not explain, however, precisely *how* the application of the

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[1] Interestingly, this Court in *DelCostello* held that, under certain circumstances, application of a *state* limitations period may be inappropriate; in such circumstances, the Court held, "timeliness rules drawn from federal law" may be used. *Id.*, 462 U.S. at 162. Should such an analysis be applied to the instant case, a 180-day statute of limitations would still be the most appropriate: surely, the timeliness rule set forth by Congress in the ADA, which specifically proscribes disability discrimination, would be an appropriate measure for a Rehabilitation Act claim.

N.C. Act's *statute of limitations* forces a potential plaintiff to make such a choice. While § 168A-11(c) of the N.C. Act requires that the state action be terminated if a federal cause of action is initiated, it does so *without regard* to the length of the statute of limitations applied to a federal claim. Thus, whether a 180-day limitations period, or a ten-year limitations period, is applied, § 168A-11(c) dictates that the state court cause of action be terminated upon the filing of a federal claim. In essence, to the extent that § 168A-11(c) requires a plaintiff to make a choice, application of the 180-day limitations period simply requires a plaintiff to make the choice sooner.

Moreover, it is ridiculous to suggest that § 168A-11(c) *violates the Constitution*[2] by refusing to allow the state's limited resources to be used to pursue duplicative remedies for rights fully vindicated under federal law. Although McCullough argues strenuously to the contrary, *the N.C. Act does not in any way require a putative plaintiff to forfeit his or her rights under the Rehabilitation Act.* The statute merely provides that a plaintiff who chooses to pursue federal remedies identical to or greater than those provided by the state should not be permitted to waste state resources by maintaining duplicative lawsuits in both forums.

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[2] In his Petition, McCullough appears to make such an argument. McCullough, however, has never before raised the issue of the constitutionality of N.C. Gen Stat. § 168A-11(c), either before the district court or before the Fourth Circuit.

In his reply brief to the Fourth Circuit, McCullough does state that if a 180-day statute of limitations is applied, N.C. Gen. Stat. § 168A-11(c) is inconsistent with the Constitution. To the extent that McCullough is arguing that *the N.C. Act itself* is unconstitutional, that argument is not before this Court. Generally, arguments not raised at the trial or appellate court level will not be reviewed on petition for certiorari to the Supreme Court absent exceptional circumstances. *See United States v. Lovasco*, 431 U.S. 783, 788 n.7, *reh'g denied* 434 U.S. 881 (1977); *Miree v. DeKalb County*, 433 U.S. 25, 33 (1977); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976); *United States v. Estate of Donnelly*, 397 U.S. 286, 295 n.5 (1970).

It is significant that there is no federal law that requires (or even encourages) a state to provide remedies for discrimination on the basis of handicap or disability. The N.C. Act does not *limit* McCullough's options, but expands them: in the absence of this statute, McCullough would have only one option with which to pursue his claims of discrimination. Because federal law or policy does not require a state to provide remedies for handicap discrimination, a state statute which provides such remedies in the event a plaintiff cannot or does not avail himself of federal remedies should not be considered unconstitutional merely because it casts its cause of action in the alternative to federal law.

B. The Circuits Are Not In Conflict.

While other circuits have applied personal injury statutes of limitations to actions under § 504, *see, e.g.*, *Hickey v. Irving Indep. School Dist.*, 976 F.2d 980 (5th Cir. 1992); *Morse v. University of Vermont*, 973 F.2d 122 (2nd Cir. 1992); and *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 982 (1992), these cases do not conflict with the instant case. In *Morse* and *Hall*, the respective states *had not enacted statutes proscribing disability discrimination*. Therefore, those courts were unable to even consider the application of a statute of limitations from a state handicap discrimination statute. *Wolsky*, 1 F.3d at 224. In *Hickey*, while the state (Texas) had enacted a statute prohibiting disability discrimination, *that statute contained no limitations period*; therefore, again, the court of appeals was forced to apply another statute of limitations. *Wolsky*, 1 F.3d at 224.

Indeed, in *Wilson v. Garcia*, one of the principal reasons why this Court applied the state statute of limitations for tort actions to federal cases brought pursuant to § 1983 was that there was essentially *no analogous state statute* in such cases. As this Court noted in *Wilson*:

> [Section] 1983 provides a "uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." The high purposes of this unique remedy make it appropriate to accord the statute "a sweep as broad as its language." Because the § 1983 remedy is one that can "override certain kinds of state laws," and is in all events, "supplementary to any remedy any State might have," *it can have no precise counterpart in state law.*

Wilson, 471 U.S. at 271-72 (emphasis supplied) (citations and footnotes omitted). Thus, the unique nature of a § 1983 remedy necessarily determined that there was no analogous state counterpart.

In this case (and in *Wolsky*), however, the relevant states enacted statutes that prohibit disability discrimination and are similar to the Rehabilitation Act. These state counterparts are clearly the most analogous state statutes of limitations. Thus, the "ostensible" conflict asserted by McCullough in his Petition is not present. *Indeed, this Court has previously denied certiorari on this precise issue. See Wolsky*, 1 F.3d 222. In short, because the decisions of other circuits are distinguishable on their facts, there is no conflict which the Court needs to resolve.

II. Because McCullough Is Represented By Counsel, McCullough's *Pro Se* Petition For Writ Of Certiorari Is Improperly Filed And Should Not Be Considered.

At all times relevant to this lawsuit, McCullough has been represented by an attorney, Robert J. Willis. As of the filing of this Petition, Mr. Willis has not submitted a Motion to Withdraw, nor has Mr. Willis notified any court in any manner of

McCullough's intention to proceed in this action *pro se*.[3] Local Rule 2.07, E.D.N.C., provides that "[N]o attorney whose appearance has been entered shall withdraw his or her appearance or have it stricken from the record except with leave of the Court." Thus, as of the time of the filing of this Petition, Mr. Willis apparently remained counsel of record for McCullough. Accordingly, because McCullough is represented by counsel and said counsel did not prepare or sign the Petition, McCullough's *pro se* Petition is improper and should not be considered by the Court.

Under 28 U.S.C. § 1654, parties may appear and conduct their cases personally or by counsel. Courts, however, have consistently held that the right to proceed *pro se* and the right to proceed by counsel exist *in the alternative*. *See, e.g., United States v. LaChance*, 817 F.2d 1491, 1498, *cert. denied*, 484 U.S 928 (1987) (right to counsel and right to proceed *pro se* exist in the alternative); *United States v. Norris*, 780 F.2d 1207, 1211 (5th Cir. 1986) (same); *O'Reilly v. New York Times Co.*, 692 F.2d 863, 868 (2nd Cir. 1982) (party must discharge attorney before appearing *pro se*); *Frank M. McDermott, Ltd. v. Moretz*, 898 F.2d 418, 422 (4th Cir. 1990) ("[i]n order for the [the defendant] to have proceeded *pro se* he must have immediately discharged the other attorneys who had filed appearances on his behalf.") (citing *O'Reilly*, 692 F.2d at 868).

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[3] It is not entirely clear whether McCullough is still represented by Mr. Willis in this matter. McCullough filed this Petition *pro se*, claiming only that Mr. Willis was unable to pay timely and proper attention to the Petition due to his crowded trial calendar. *Petition* at 12. In correspondence to BB&T's counsel, Mr. Willis has stated that "[his] representation of McCullough in this matter ended when a final judgment for costs was entered by the federal court," presumably referring to the Fourth Circuit's judgment and mandate. Mr. Willis also indicated that he still represents McCullough in conjunction with McCullough's parallel lawsuit against BB&T in state court.

Because Mr. Willis has not withdrawn from this case, under the local rules for the Eastern District of North Carolina and the law of the Fourth Circuit, Mr. Willis remains counsel of record for McCullough. Accordingly, McCullough's *pro se* Petition was improperly filed and should not be considered by this Court.[4]

CONCLUSION

For all of the foregoing reasons, this Court should deny McCullough's Petition for Writ of Certiorari.

Respectfully submitted,

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[4] Additionally, Sup. Ct. R. 33.2 states that every document submitted to the Court must bear "the name of the member of the Bar of this Court *who is counsel of record for the party concerned* . . . " (emphasis supplied). McCullough has not complied with this rule because his Petition does not have the name of his counsel of record, Mr. Willis. Moreover, because McCullough is represented by counsel of record, the certificate of service submitted by McCullough is defective inasmuch as it was not signed by ". . . a member of the Bar of this Court representing the party on whose behalf service is made." *See* Sup. Ct. R. 29.5(b).